

IN THE SUPREME COURT OF BELIZE A.D. 2020

CLAIM NO. 159 OF 2020

(GAS TOMZA

CLAIMANT

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(THE ATTORNEY GENERAL

DEFENDANT

BEFORE THE HONORABLE MADAM CHIEF JUSTICE (Ag) MICHELLE ARANA

Douglas Mendes SC along with Audrey Matura and Jose Alpuche for the Claimants

Andrew Marshalleck SC of Barrow & Co. along with Agassi Finnegan for the Defendants

FACTS

1. The Claimants, Gas Tomza Ltd., Western Gas Co. Ltd, Southern Choice Butane Ltd. (d.b.a. Zeta Gas), and Belize Western Energy Ltd. are four local companies engaged in the business of

importing and selling liquefied petroleum gas in Belize for the past 30 years. The Defendants are holders of public offices within the Government of Belize with the Controller of Supplies, appointed pursuant to the Supplies Control Act Chapter 293 being responsible for granting permits to importers who comply with the LPG Act, the regulation and control of the LPG industry, the Minister holding the portfolio for Economic Development, Petroleum, Investment, Trade and Commerce and the Attorney General being the principal legal officer for the Government of Belize. On September 4, 2019, the government passed this National Liquefied Petroleum (NLP) Act which made the gas industry subject to certain regulations and which made the National Gas Company (NGC) the sole importer of NLP gas into Belize. Liquefied Petroleum Gas is one of the main sources of fuel used in Belize for household cooking, carburation (the process of mixing (as in a carburetor) the vapor of a flammable hydrocarbon (such as gasoline) with air to form an explosive

mixture especially for use in an internal-combustion engine) and agro-industrial applications such as crop drying and water heating in the restaurant and hotel sectors). The demand for LPG in Belize is approximately 12 to 13 million gallons of LPG per annum. Under the NLP Act, the importation of NLP became a monopoly, with the NGC becoming the **sole** importer legally allowed to partake in the business of importation of LPG into Belize.

2. The Claimants brought an amended application for relief under the constitution on July 20, 2020 against the government seeking various declarations and damages for alleged breaches of their constitutional rights arising from this new NLP Act. Several months into this trial and nearing the conclusion of this matter, the government amended the NLP Act. Under the amended Act, the government put additional regulations in place which the government says now allows other companies including the Claimants to apply for a licence to import LPG into

Belize once the requirements of the amended Act are complied with. However, the Claimants say that this amended Act is “colourable legislation” in that it purports to do exactly what the original Act did i.e. make the NGC the sole importer of liquefied gas into Belize, to the exclusion of the Claimants and all other potential investors. The Claimants aver that this Amended NLP Act deprives them of their constitutional right to earn their livelihood by imposing onerous and unreasonable regulations as a prerequisite for obtaining a licence to importing LPG into Belize. The Claimants further say that the Amended Act is unconstitutional, in that their exclusion from the business of importation of LPG is a breach of their constitutional rights to freedom of association, freedom to earn a living in a business of their choice and violation of their right to equal treatment under the law. The Claimants seek several declarations as well as damages including vindicatory damages as compensation

from the Government for the breaches of their constitutional rights.

3. The Defendants for their part say that since the original Act has been revised to now allow other companies, including the Claimants, to participate in the importation of LPG into Belize, the Act is no longer objectionable. The Defendants further contend that the amendments to the previous legislation have been passed by parliament in the interest of the public good since the liquefied petroleum gas industry in Belize must be regulated in order to meet international standards, and that the health and safety of the general public in Belize must be protected against the hazards attendant to this industry. The Defendants further say that the court should not allow the Claimants and their particular circumstances of not being able to afford to meet the requirements of the Amended Act to cause the legislation to be struck down. The argument of the Defendants is that while the statutory requirements to obtain a

license are costly and may indeed be onerous for the Claimants, those same requirements may not be onerous for other potential investors who wish to participate in the importation of LPG. The Defendants also say that the issues raised by the Claimants are matters of policy which lie within the purview of the Executive and that the court must be mindful of upholding the separation of powers doctrine. The court now examines these legal arguments for and against this claim in determining the issues in these matters, which the parties have agreed will be decided on the papers.

Agreed Statement of Issues to be Determined at Trial

4. On the 16th September 2022, the parties filed an Agreed Statement of Issues to be Determined at trial:

- i) Whether the Amended Act imposes onerous and unreasonable conditions on the Claimants in order for

them to engage in the business of importation of LPG in Belize;

ii) Whether the Amended Act is inconsistent with section 15 of the Constitution of Belize as it creates and facilitates a monopoly in the importation of LPG into Belize;

iii) Whether the Amended Act is inconsistent with section 17 of the Constitution of Belize as it compulsorily takes possession of and/or acquires the goodwill in the Claimants' LPG import business without any compensation;

iv) Whether the Amended Act is inconsistent with section 13 of the Constitution of Belize and therefore void as it hinders the Claimants' freedom of association by requiring them to purchase LPG from the National Gas Company or otherwise comply with onerous and unreasonable conditions under the Amended Act in order to import LPG themselves;

v) Whether the Amended Act is inconsistent with section 6 of the Constitution of Belize and therefore void as it subjects the Claimants to unequal and discriminatory treatment under the law by:

1) Permitting the National Gas Company to engage in the LPG import business as well as sales and distribution whilst prohibiting the Claimants from engaging in LPG importation by imposing onerous and unreasonable conditions on the Claimants in order to import;

2) Granting tax incentives with respect to the National Gas Company's LPG import business which incentives have never been granted to the Claimants.

Issue Number One

Whether the Amended Act imposes onerous and unreasonable conditions on the Claimants in order for them to engage in the business of importation of LPG in Belize

5. On this first issue, the Claimants argue that the Amended NLP Act amounts to “colourable legislation” in that it seeks to do exactly what the original Act did- make the National Gas Company (NGC) the sole importer of National Liquefied Petroleum (NLP) into Belize. The Claimants say that the effect of the Amended NLP Act is that the Claimants may apply for a license to conduct their NLP Import business on condition that it either
 - a. Constructs an authorized import facility, with a storage capacity of 1.5 million US gallons; or
 - b. Imports through NGC’s LPG Terminal.

The Claimants say that constructing a 1.5 million US gallon import facility in order to be permitted to import LPG would mean that Belize would have an LPG storage facility that would be 400% greater than what the government had indicated was necessary to meet the national demand. This would amount to at least 5 million US gallons of wasted storage capacity per month. The cost of constructing such a facility would be between BZ\$60 million and BZ\$43 million. The Claimants contend that it would be financially impossible for them to meet this onerous condition and that they cannot afford to build such a facility, especially since there would be no guarantee that they would be granted a license to import, even if they were to construct the facility. For these reasons, the Claimants say that the requirements of the Amended NLP Act are unreasonable and onerous. The Claimants rely on *Rv Big M Dry Mart Ltd.* [1985] SCR 295 as an example of a case where legislation was deemed to be unconstitutional even if the purpose of that legislation was legitimate. It is submitted that the Amended NLP

Act has created an economically unfeasible and manifestly absurd requirement that each and every person who wishes to be an LPG importer must construct a facility that is massive enough to supply all of Belize's LPG needs. The only alternative is that the Claimants must rely on their competitors, NGC, to allow them to import LPG through NGC's facilities, and this is untenable because it forces the Claimants to associate with their competitors in an unregulated manner.

6. The Defendants argue that the law as amended removed the exclusive right of the NGC to import LPG into Belize, and has replaced it with a new provision which has the direct effect of allowing entities and/or persons other than the NGC to import LPG into Belize. The Defendants say that these conditions are not onerous nor unreasonable in that the same requirements that must be met by the Claimants in the importation of LPG into Belize are the same requirements that must be met by the NGCL and by all other importers. There has never been an

unqualified right to import LPG into Belize and the requirements for a license to import LPG are subject to change by regulatory authorities. The Defendants also say that the requirements of the Amended Act are not onerous and not excessively burdensome as they are necessary for protecting the public interests of dealing with LPG safely, securing adequate in country supplies of LPG at all times, rationalizing the price of LPG in Belize and supervising the quality of LPG sold to Belizean consumers. A review of the conditions imposed by the Amended Act do not, as the plain and ordinary meaning of the word 'onerous' suggest, counterbalance or exceed the advantage to be derived from the imposition of the requirements, and are not such that no reasonable authority could have arrived at them. When these conditions of licensing are weighed against the justification for their imposition, the assistance given by the State to allow for interested persons to recoup both the investment and the regulatory costs by way

of the import/wholesale price by way of the new pricing methodology, and the Claimants' own position regarding the terminals, it is clear that these conditions do not place an unreasonable burden on the Claimants which counterbalances the benefit derived from the establishment of LPG terminals in Belize required to meet international standards, and which allow for conformity testing to protect consumers. The conditions of the licence are a matter of policy that the legislative branch is the only branch who is properly able to make determinations as to policy. The Defendants urge the court to bear in mind the separation of powers principle between the judiciary, the executive and the legislature. They say that the storage capacity of import landing facilities for LPG in Belize as well as the acceptable level of in country LPG supplies are matters of policy for Parliament and for the people of Belize to determine, and are not to be determined by the investments and business strategies of the Claimants.

7. Decision on First Issue

Having carefully considered the evidence and the arguments for and against this issue, I find in favor of the Defendants on this first issue. There is the principle of presumption of constitutionality with which the court must view all legislation. This question of the conditions to be imposed on the grant of a licence to import LPG is a question of executive policy and while the condition/requirement to build a storage facility of 1.5 million gallons is indeed extremely costly, or the alternative requirement to store LPG in the facilities of the NGC is not palatable to the Claimants, those conditions do not, without more, amount to a breach of the Claimants' constitutional rights. The purpose of the Amended Act No. 44 of 2021 is set out in the preamble as follows:

“An Act to amend the National Liquefied Petroleum Gas Project Act, Act No. 12 of 2019 of the Substantive Laws of Belize, Revised Edition 2011; to require the Developer to obtain a licence

to import LPG into Belize; to provide for a new LPG pricing methodology; and to provide for matters connected therewith or incidental thereto”

On the face of it, this Amended Act is designed to regulate the manner in which LPG is imported into Belize. The Claimants now have the opportunity to import LPG under this new regime, if they can afford to fulfill the condition under section 7 of the Amended Act, of building a Schedule II storage facility, with the capacity to store 1.5 million gallons of LPG, or if they agree to store the LPG that they import in the NGC’s storage facility. While it is quite likely that the Claimants, and many other potential investors, may not be able to afford to construct such an expensive facility ranging between BZ\$40 million (as per the evidence of the Claimants’ expert) to BZ \$60 million dollars (as per the evidence of the Defendants’ expert), the conditions of the licence is the policy of Parliament which it is fully empowered to make. The Second Defendant as the Minister of

Economic Development, Petroleum, Investment, Trade and Commerce, along with Cabinet, in their wisdom, have decided that this is the manner in which the importation of LPG will now be executed and regulated to protect the health and safety of the Belizean public and to meet international standards. While the previous Act had created a monopoly which legally barred the Claimants from continuing to import LPG into Belize, and mandated that the NGC was the only entity legally allowed to import LPG, this Amended Act has now removed that provision and replaced it with these two conditions under which a licence to import can now be granted to the Claimants, or to any other potential investor. I agree with learned Counsel for the Defendant that, while the price tag on constructing such a facility may indeed be onerous for the Claimants, given their individual financial circumstances, that does not mean that the Amended Act should be struck down as it does not amount to an automatic breach of the Claimants' constitutional right to

engage in a business of their choosing. In **Frank Hope Competent Authority and the AG of Guyana v. New Guyana Co. Ltd. and Vincent Teekah**, cited by Mr. Marshalleck SC in his final closing written submissions Crane JA stated that “ *Every country in the world has and must exercise control over imports and exports in the public interest; that is part of executive policy, a sphere into which courts of law are not competent to enquire.*”

I therefore find in favor of the Defendants on this first issue.

Issue Number Two

Whether the Amended Act is inconsistent with section 15 of the Constitution of Belize as it creates and facilitates a monopoly in the importation of LPG into Belize;

8. The Claimants contend that the Amended Act denies them the opportunity to gain their living from their freely chosen work of operating LPG Import Businesses in breach of section 15 (1) of the Constitution of Belize. They say that the purpose

and effect of the Amended NLP Act is the same as the original NLP Act – the appointment of the NGC as the sole importer of LPG in Belize, only now in disguise. The Claimants further say that the main drivers that were the impetus behind the original Act which made the NGC the sole importer of NGC were :

- i) The Contractual Obligation of the Government of Belize under the Definitive Agreement under s.15 to pass legislation “to appoint the NGC to serve as the sole wholesale importer of LPG Products for the country of Belize.” (indemnity clause)
- ii) The NGC’s LPG Terminal is extremely costly, and by the evidence of the Defendants the construction costs BZ\$60 million. It has a storage capacity of 1.5 million US gallons. The Claimants say that for such a massive project to be economically feasible, the NGC would have to import and sell all the LPG required in Belize; it is submitted that that is the reason why the legally

binding measures were put in place to ensure that the NGC was the sole importer of LPG, since that is the only way for such a large project to be economically feasible.

- iii) The Claimants also say that the NGC entered into funding arrangements under the Definitive Agreement to finance the construction of the LPG Terminal. It is submitted that the repayment terms of the bonds are dependent on the NGC importing and selling 12 million US dollars of LPG. (Pricing Methodology).

The Claimants rely on the recent Privy Council decision of **AG of Trinidad and Tobago v Akili Charles [2022] UK PC** for the test to be applied by the court in determining whether legislation has a valid purpose:

“the modern conventional approach to issues of proportionality ... involves asking in relation to a measure: (i) whether its objective is sufficiently important to justify the limitation of a fundamental

right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive method could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interest of the community.

The Claimants argue that they are therefore prohibited from operating their LPG Import Businesses as

- a. It is simply economically unfeasible to construct and operate a 1.5 million US gallon import facility unless one has a monopoly of the LPG Import Business in Belize;
- b. The alternative of importing through their competitor's facility (i.e. the NGC's LPG Terminal) is unrealistic as the NGC is not regulated.

The Claimants therefore say that these conditions for a license under the Amended Act constitute a

violation of their constitutional right under section 15(1) of the Constitution of Belize to gain a living through work that they freely choose and accept by engaging in a trade or business.

9. The Defendants submit that the Claimants' interpretation of the Amended Act is erroneous and does not reflect the true state of the law as it relates to the Constitution of Belize. In any event, it is submitted that the Claimants hinge their argument as to unconstitutionality of the Amended Act on a consequential or incidental effect of the legislation, and not on any direct or inevitable effect of it. The Defendants say that the true nature of the right to work under section 15 of the Constitution of Belize has been examined and articulated by the Court of Appeal of Belize and the Caribbean Court of Justice. Citing **Civil Appeal Nos. 4 and 7 of 2008 Fort Street Tourism Village v The AG of Belize et.al** where President Mottley (as he then was) explained that what was often described as '*the right to work*'

was in actuality *'the opportunity to work'* and it was the opportunity that must not be denied to the citizen. Justice of Appeal Morrison (as he then was) agreed with President Mottley and said that section 15 of the Constitution protected the citizen against “ *situations where, through legislation, regulation, or administrative action on the part of a public authority, an **unjustifiable fetter** is placed on the citizen's right to freely choose or practice a trade or profession.*” The Defendants say that what the right to work entails is that persons be given **an opportunity** to earn a living, and not a guarantee of employment nor any guarantee of profit from any chosen business activity. It is submitted that under the Amended Act, a monopoly no longer exists, since the exclusivity clause in favor of the NGC has now been removed. The opportunity to engage in the importation of LPG is now extended to the Claimants and to any other investor who chooses to participate in this industry, as long as they are

licensed to do so. The Defendants also cite the decision of the Guyanese Court of Appeal in **Frank Hope v Competent Authority et.al (1979) 26 WIR 233**, where the Court of Appeal overturned the decision of the court below impugning and striking down Trade Ordinances as unconstitutional on the ground that the requirement by the competent authority of an import licence and the payment of a fee as a condition precedent to the obtaining of newsprint amounted to a hindrance within the meaning of Article 12(1) of the Constitution of Guyana. Crane JA held that the matter of whether an owner would be allowed an import licence to modernize and improve upon old printing equipment by acquiring the latest and most expensive machinery that money can buy must also, just like the decision of more import of newsprint, be a **matter of government policy and discretion with which the courts cannot rightly concern themselves.** **There is no fundamental right to import without licence either**

newsprint or printing equipment, even though the press has a fundamental right to express itself thereon and thereby. The Court went on to state that the Court will **always** assume, **until the contrary** is proven, that the competent authority exercises his statutory discretion to grant or withhold licences, under s. 8(3) bona fide and in accordance with the principles, aims and objects of the Trade Ordinance as set out in the long title and in accordance with any recommendations he has given to the Minister.

Decision on Second Issue

10. I find in favor of the Defendants on this issue. The Claimants have enjoyed relatively unfettered access to importation of LPG into Belize for the past thirty years, which allowed them to build thriving businesses for many years. The Government of Belize has decided that it is now time to regulate the importation of LPG into Belize to bring the industry up to international standards. Now this decision is clearly not convenient to the

Claimants. They claim that the effect of this new statutory regime under the original as well as the Amended Act is that the NGC is a monopoly which has completely decimated their LPG importation businesses. However, the fact remains that the government has the legal right to make the decision that it made. The right dates back to the “in the power of the King” as described by Jeffrey LCJ in **East India Company v Sandys (1684) 10 St Tr 371** referred to as the great case of monopolies. In these modern times, that power previously wielded by the King is now exercised by Parliament. The Minister of Economic Development, Petroleum, Investment, Trade and Commerce has been duly elected into parliament and his executive power cannot be interfered with by the Judiciary, unless it is manifestly demonstrated that the power was exercised in bad faith. As I see no evidence of bad faith in the exercise of the power of the executive in this case, I find in favour of the Defendants on this second issue.

Issue Number Three

Whether the Amended Act is inconsistent with section 17 of the Constitution of Belize as it compulsorily takes possession of and/or acquires the goodwill in the Claimants' LPG import business without any compensation

11. The Claimants submit that it is a sterile argument by the Defendants that the Claimants can acquire no goodwill in the importation aspect of their business because they do not import LPG on behalf of any specific customer, but import only for themselves and then re-sell to other persons, either wholesale or retail. This argument is sterile because the sole purpose of the Claimants' import business is to sell on to other persons, even though in purchasing LPG for importation, the Claimants may not be acting as an agent of those persons to whom they eventually sell the imported LPG, or that no specific or identifiable quantum of the bulk of imported LPG is

earmarked for a particular customer. To import LPG without selling locally to customers is a commercial absurdity. There is no commercial value in importing LPG for the sake of acquisition and then presumably just storing it. By importing and selling the LPG to customers whether on a wholesale or retail basis for many years, the Claimants will have developed a reputation among their clients for efficient and quality service which would have ensured their continued business. The case cited by the Claimants to illustrate the concept of goodwill is **Manitoba Fisheries v The Queen..[1979] R.C.S. 101**, where Richie J. stated:

“... the appellant’s suppliers and customers who it had acquired and cultivated over the years constituted one of its most valuable assets as of April 30, 1969, and on the following day that asset was completely extinguished and the suppliers and customers were left with no choice but to do business with the Freshwater Fish Marketing Corporation which was created...

for the express purpose of enjoying a monopoly of the market in which the appellant had formally prospered.”

The Claimants say that this passage provides the clearest example in which the goodwill of a company is expropriated when the former customers of that company are forced to take their business to the entity now vested with the monopoly. They say that while the unamended Act does not force the Claimants' erstwhile customers to take their business to NGC, and the Claimants are not prohibited from continuing their wholesale and retail businesses, the fact that the Claimants' erstwhile customers and the Claimant are both required by the Act to purchase LPG from the NGC alone at the same price, means that the Claimants' erstwhile customers are able to cut out the Claimants as the middlemen and go directly to the NGC, thereby avoiding the additional sums which the Claimants would have to add on to the price they pay to the NGC in order to hope to turn a profit. The expected and inevitable result is

that the Claimants have lost a substantial number of their customers to the NGC in the same manner as if the law had forced them to buy from the NGC alone. The removal of the exclusivity provisions of the Act which made the NGC the sole importer of LPG does not remedy the situation because the requirements to obtain a license to import LPG are unreasonable and onerous. The evidence establishes that the NGC has been able to poach a significant portion of the Claimants' customer base and thereby expropriate their goodwill. That expropriation continues under the Amended Act without compensation, thereby violating the Claimants' right to property under section 17 of the Constitution of Belize.

12. The Defendants argue that while they accept that goodwill is property, the Amended Act is not inconsistent with the Constitution and therefore void as it does not in any way operate to compulsorily acquire or take possession of any purported goodwill belonging to the Claimants. In fact, the

Amended Act does the very opposite by removing the initial complaint of exclusivity clause which prevented the Claimants from being issued with importation licences, and instead providing that any person can be granted an import licence subject to uniform regulatory requirements. The Defendants also say that since the Claimants did not engage in the importation of LPG for others, and only for themselves which allowed for the realization of greater margins in their wholesale and retail sales of LPG in Belize, there exists no goodwill in any importation business for the Defendants to acquire and given its non-existence, the Act cannot conceivably operate to take away that which does not exist. In the alternative, the Defendants submit that even if the Court were mindful that the qualifications for a licence imposed by the Amended Act have the effect of adversely affecting any goodwill of the Claimants attached to importation business, the said effect is only an indirect consequence of the legislation, and the Claimants are

not due any compensation because such indirect adverse economic consequence is not protected by section 17 of the Constitution.

13. Decision on Issue 3

Having considered the arguments for and against this third issue, I find in favour of the Claimants. To my mind, with all due respect to the arguments of Mr. Marshalleck SC for the Defendants, there can be no doubt that the direct effect of the Original as well as the Amended Act is that the NGC abruptly seized the clients and customer base of all five of these Claimant companies that they had established in Belize over the past thirty years, without compensation, thereby violating the Claimants' constitutional right to property. Section 17(1) of the Constitution of Belize reads as follows:

17.-(1) No property of any description shall be compulsorily taken possession of and no interest in or right over property of

any description shall be compulsorily acquired except by or under a law that-

(a) prescribes the principles on which and the manner in which reasonable compensation therefor is to be determined and given within a reasonable time;

(b) secures to any person claiming an interest in or right over the property a right of access to the courts for the purpose of-

(i) establishing his interest or right (if any);

(ii) determining whether that taking of possession or acquisition was duly carried out for a public purpose in accordance with the law authorising the taking of possession or acquisition;

(iii) determining the amount of the compensation to which he may be entitled; and

(iv) enforcing his right to any such compensation.

As Mr. Mendes SC for the Claimants has argued, correctly in my respectful view, the expected and inevitable result of these two

Acts, the original and the Amended Acts, is that the Claimants have lost a substantial number of customers to the NGC in the same way as if the law has forced them to buy from the NGC alone. Prior to the establishment of the NGC, Belizean customers purchased LPG from these Claimants for 30 years; the names of each of these companies were household names in Belize as suppliers of butane and other LPG products. Parliament proceeded to pass a law making the NGC the sole importer of LPG, then amended that law to impose conditions allowing other importers to become licensed under the Amended Act and as I have already ruled in determining issues one and two in this matter, Parliament in the exercise of its executive power, has the power to do so. I find that the exercise of this power, while completely legal, carries with it key similarities to the legal power of the acquisition of land for a public purpose by the government. The magnitude of the power of government to seize that most primordial of the citizen's

property is demonstrated time and again, where e.g. land that has been in one's family for generations, land whose value to the owner's family may be difficult to assess in monetary terms based on the immense sacrifices made to attain it, that land can be, and is often legally appropriated forthwith by the government for a public purpose e.g. building a road or a hospital, once the owner of that land is duly compensated. The direct effect of the exercise of legislative power in this case at bar is that, in one fell swoop, customers in Belize who formerly relied on the Claimants to provide their LPG needs for the past 30 years became customers of the NGC, the sole importer licenced under both Acts to date. As a result of not being able to pay for LPG that they cannot import, the First and Second Claimants allege that they are contractually liable to pay their previous suppliers BZ\$44,071,440.00. In addition, the First and Second Claimants say that since having to purchase LPG from the NGCL, they have had to incur extra costs totaling

BZ\$6,804,855.07. Since having to import LPG from the NGCL as opposed to its previous supplier, the Third Claimant has incurred additional costs of BZ\$1,194,725. 87 and has had to close down its business as a result of the losses incurred. The Fourth Claimant is claiming BZ\$3,696,000.00 as it has been unable to import LPG since May 2020 and has been unable to pay its previous LPG suppliers for the past 28 months. The Fourth Claimant has been unable to pay its LPG supplier BZ\$3,696,000.00, transportation costs of BZ\$792,000.00, additional costs of BZ\$1,960,000.00 to purchase LPG from the NGCL instead of its previous supplier. I find that the sums claimed as damages in the Claimants' most recent written submissions of September 16, 2022 are unsubstantiated, therefore I have no basis on which to grant these sums.

While I have found that the recent sums claimed have not been established to the satisfaction of the court on a balance of probabilities, I have found that the sums claimed in earlier

written submissions dated March 2, 2021 on behalf of the Claimants have been proven by the evidence. Mr. Mendes SC submits on behalf of the Claimants that the losses which each of the Claimants suffered is a proper measure of the goodwill which was expropriated by the Act and vested in the NGC. The Claimants' customers were poached by the NGCL resulting in a direct loss of income and the losses sustained by the Claimants. I find that the Claimants have established on a balance of probabilities that their customers and therefore their goodwill has been appropriated by the NGC, without compensation; their constitutional right to property has been violated and for that violation they must be duly compensated. I accept as true, the evidence of witnesses Amira Gutierrez, Accountant and General Manager, for Belize Western Energy Ltd at paragraphs 46 to 52 of her Affidavit dated October 5, 2020, as well as her Affidavit dated February 17, 2021 at paragraphs 28 to 31, paragraphs 57 to 59, Stivaly Andrade, Accountant, for Gas

Tomza and Western Gas Co. Ltd at paragraphs 64 to 73 as well paragraph 74 to 78 in his Affidavit dated October 5, 2020 and Ernesto Uh, Accountant, on behalf of Zeta Gas (Southern Choice Butane Ltd.) at paragraphs 61 to 65 of his Affidavit establishing the financial losses suffered by the Claimants as a direct result of NGC seizing their customers from them without paying them any compensation.

I therefore order that the Claimants are entitled to the award of damages sought in compensation for this breach of their constitutional right to property as set out in the table on pages 46 and 47 of Mr. Mendes’s written submissions dated March 2, 2021.

Claimant	Type of Loss	Amount Bz\$
Gas Tomza and Western Gas	Loss of wholesale clients	1,963,411.28
Gas Tomza	Loss of sales from Non-Retail customers	2,120,698.00
Gas Tomza	Loss of sales from Distribution and Concession Plant	1,405,123.00

Western Gas	Sales from Non-Retail customers	574,105.00
Western Gas	Bulk, Wholesale and Distribution and Concession plant sales	572,402.00
Zeta Gas	Overall Loss	2,488,937.12 (loss of Bz\$677,420.04 added to former profit of Bz\$1,811,513.08)

I also award Belize Western Energy the sum of \$1,772,074.85 as damages for loss of goodwill based on the evidence of Ms. Amira Gutierrez in her Affidavit dated October 5, 2020 paragraph 66.

The court awarded these sums as damages as compensation for the breach of the Claimants' constitutional right to property under section 17; the court will not be awarding vindicatory damages requested by the Claimant.

Decision on Issue Number 4

Whether the Amended Act is inconsistent with section 13 of the Constitution of Belize and therefore void as it hinders the Claimants' freedom of association by requiring them to purchase LPG from the National Gas Company or otherwise comply with onerous and unreasonable conditions under the Amended Act in order to import LPG themselves.

14. The Claimants submit that there are other measures which are less intrusive of the right to freedom of association than the creation of a monopoly that could ensure the security and safety of LPG. They argue that no evidence has been tendered as to why the entry of NGC into the market as one of many importers could not have ensured such security and safety without a monopoly. Irrefutable proof that there were less intrusive measures is shown by the fact that under the Amended Act, the Claimants would be allowed to put the safety

and security of LPG in the hands of the Claimants, on condition that the Claimants met the statutory requirements. In answer to the contention by the Defendants that the Claimants are not compelled to contract with the NGC to store its imported NGC since the Claimants can build their own storage facility, Mr. Mendes SC submits on behalf of the Claimants that the right to freedom of association is not satisfied if the only other option to association against one's will is to pursue the unattainable or the destructive. He further says that a breach of a constitutional right is justified in the public interest only if that breach satisfies a proportionality test; the legislative pursuit of an otherwise legitimate public goal, but which can be achieved with a less intrusive infringement of a constitutional right, or no infringement at all, will not meet the threshold test of proportionality.

15. The Defendants submit that the Amended Act is not in any way inconsistent with section 13 of the Constitution of Belize as the Act does not in any way force the Claimants to purchase LPG from the National Gas Company Ltd. Mr. Marshalleck SC argues that what the Amended Act does, when its provisions are taken as a whole, is to present any interested person with options to achieve their ultimate goal of importing LPG into Belize. He says that it is entirely up to the Claimants or any other interested person herein to determine which course they wish to adopt. They get to decide whether they wish to associate with the NGC, or construct their own facility. Since the Amended Act extends the option to the Claimants and to all other persons desirous of conducting importation to associate with NGCL or construct their own facilities, it cannot be said that the Claimants have established a prima facie case of a breach of section 13.

16. Decision on Issue Number Four

Having considered the submissions for and against this issue, I find in favour of the Defendants on this fourth issue. In my respectful view, if the original Act had remained unamended, the Claimants would have succeeded on all the issues raised in this claim because the monopoly created by that original Act clearly violated all the Claimants' constitutional rights as they have averred. I find that the Amended Act clearly provides options for the Claimants to obtain a licence to import LPG through two distinct routes i) by building their own storage facility in keeping with the standards required by the Act or ii) using the existing storage facility created by NGC to store their LPG. I fully appreciate the fact that the creation of its own storage facility is not a viable option for the Claimants given its expensive price tag. However, I find that the option of storing LPG is open to the Claimants, and while that option of storing their imported LPG in the facility of their competitor might still not be optimal for the Claimants, it is still an option that they

may wish to consider under this new regime. I have not heard any arguments or seen any evidence to convince me on a balance of probabilities why this second option is not viable for the Claimants or any other potential investor in the LPG industry in Belize. I find that the government has sought to properly regulate the LPG industry with the passage of these two acts, in the public interest of protecting public health and safety as well as elevating the standards of the importation of LPG in Belize to international standards; I find nothing nefarious in the provisions of the Amended Act that would amount to a violation of the Claimants' right to freedom of association.

Issue Number Five

Whether the Amended Act is inconsistent with section 6 of the Constitution of Belize and therefore void as it subjects the Claimants to unequal and discriminatory treatment under the law by:

1) Permitting the National Gas Company to engage in the LPG import business as well as sales and distribution whilst prohibiting the Claimants from engaging in LPG importation by imposing onerous and unreasonable conditions on the Claimants in order to import;

2) Granting tax incentives with respect to the National Gas Company's LPG import business which incentives have never been granted to the Claimants.

17. The Claimants submit that they were denied equal protection of the law under section 6 of the Constitution of Belize under the unamended Act, in that the legislation singled out the NGC for a benefit in granting the NGC a monopoly over the importation of LPG. The Claimants further say that the NLP Act grants the NGC as a person operating an LPG Import Business, tax incentives and relief from all exchange control laws. The Claimants have never been granted such benefits despite being

operators of LPG import businesses for many years and have therefore not been treated equally with the NGC. They also say that While on the face of it the Claimants are now equal to the NGC under the Amended Act, as regards having the opportunity to obtain a licence, Mr. Mendes SC says that the Claimants are still not in a position of equality since they never received the benefits of the tax exemptions and other facilities afforded to the NGC for over a year which enabled the NGC in building a 1.6 million Gallon storage facility. Even after the Act was amended, those benefits have never been extended to the Claimants to date.

18. The Defendants submit that the arguments of the Claimants on this issue are wholly misconceived. Mr. Marshalleck SC cites dicta from the Privy Council in **Webster and others v The AG of Trinidad and Tobago [2015] UKPC 10** as cited by Griffith J in **Melissa Tucker v Chief Executive Officer Claims 305 of 2014 and 199 of 2015**.

Baroness Hale stated thus:

“The ‘equal protection of the laws’ requires that the laws themselves be equal. But the problem is that the law necessarily has to treat different groups of people differently. The question is whether such distinctions are justified.”

Mr. Marshalleck SC submits that the Claimants are unable to establish on a balance of probabilities that the Act breaches their fundamental right to equal protection of the law. The conditions complained of do not prohibit the Claimants from engaging in importation; the Amended Act removes the exclusivity clause which had the direct effect of preventing the Claimants from engaging in the importation in circumstances where they were not successful in the NGCL tender process. There is no difference in treatment under the Amended Act in that the requirements that NGCL must meet to secure a licence to import and to engage in the sale and distribution of LPG in Belize are indeed the same requirements which the Claimants must meet to engage in that activity.

19. Decision on Issue Number Five

I agree with the Defendants on this issue. The Amendments to the original Act, while admittedly not levelling the playing field for all operators in the industry, have most certainly removed the monopoly by introducing the licencing regime. As the provisions of the Amended Act now require, everyone who wishes to be a participant in the business of LPG importation will now be able to do so, once the statutory requirements are met. Parliament has granted certain benefits to the NGC and in my view those benefits are discretionary and well within the executive power of government to do so. As Baroness Hale has so eloquently stated in the **Webster** decision cited earlier, in discussing the principle of equality before the law in our courts:

“a test of “sameness” is inadequate to secure real equality of treatment. It is almost always possible to find some difference between people who have been treated differently. The Court held that “discrimination” entails an unjustified difference in treatment.

Justification is divided into two questions: does the difference in treatment have a legitimate aim and are the means chosen both suitable to achieve that aim and a proportionate way of doing so?"

As Mr. Marshalleck SC argues, correctly, in my view the right to equality before the law does not guarantee sameness meaning that a person or group of persons would be offered exactly the same benefits, but the right does entail ensuring that persons are not treated differently based on discrimination or in a disproportionate manner.

I therefore find that the Claimants do not succeed on this fifth issue.

20. The orders of the Court are therefore as follows:

Judgment in favour of the Defendants on the first, second, fourth and fifth issues. Judgment in favour of the Claimants on the third issue, with damages awarded to the Claimants as compensation for the breach of their constitutional right to property under section 17 of the Constitution of Belize.

Each party to bear own costs.

Dated this day of September, 2022

Michelle Arana

Supreme Court Judge

Supreme Court of Belize